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8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF ALASKA**  
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12 **Jerry L. DuBois,**

13 **Plaintiff,**

14 **vs.**

15 **Coeur Alaska, Inc., d.b.a. Kensington**  
16 **Mine; Coeur Mining, Inc.; and Coeur**  
17 **d’Alene Mines Corp.,**

18 **Defendants.**

**3:13-cv-00177 JWS**

**ORDER AND OPINION**

**[Re: Motions at Docket 33, 34]**

19 **I. MOTION PRESENTED**

20 Defendants Coeur Alaska, Inc., d.b.a. Kensington Mine, Coeur Mining, Inc., and  
21 Coeur d’Alene Mines Corp. (collectively, “Coeur”) filed two motions for partial summary  
22 judgment pursuant to Rule 56(a). Coeur’s first partial summary judgment motion, at  
23 docket 33, seeks an order establishing that the actions of plaintiff Jerry L. DuBois  
24 (“DuBois”) amount to contributory negligence. DuBois opposes this motion at  
25 docket 47, and Coeur replies at docket 55.  
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1 Coeur's second partial summary judgment motion, at docket 34<sup>1</sup>, seeks an order  
2 establishing that DuBois lacks sufficient evidence to show that he has suffered a severe  
3 permanent physical impairment under AS 09.17.010(c). Coeur's memorandum in  
4 support of this motion is at docket 35. DuBois opposes the motion at docket 46, and  
5 Coeur replies at docket 62.

6 At docket 63 DuBois filed a motion for leave of court to file affidavits from experts  
7 Terrance Dinneen and Robert R. Stephens in support his two oppositions. The court  
8 granted this motion at docket 65. Oral argument was not requested and would not assist  
9 the court.

## 10 **II. BACKGROUND**

11 DuBois was working as a mine safety inspector for the U.S. Department of Labor  
12 when he fell from a deck and was injured at Coeur's Kensington Mine.<sup>2</sup> DuBois claims  
13 that the deck's guard railing broke when he leaned against it, causing him serious  
14 injuries.<sup>3</sup> DuBois brought a negligence action against Coeur in state court, which Coeur  
15 removed to this court.<sup>4</sup>

16 DuBois' complaint alleges that the railing was defective because, among other  
17 things, it was attached to the outside of its 4x4 support posts, meaning that "structural  
18 integrity of the guard rail relied entirely on the fasteners used to secure the railing and  
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24 <sup>1</sup>Coeur styled its motion as a Rule 56 "motion for rule of law," but Rule 56 does not  
25 recognize any such motion—Rule 56 governs summary judgment. Coeur's motion is properly  
characterized as a partial summary judgment motion.

26 <sup>2</sup>Doc. 1-1 at 1 ¶¶ 1, 4; *id.* at 16-17 ¶¶ 1, 4.

27 <sup>3</sup>*Id.* at 1-2 ¶ 4.

28 <sup>4</sup>Doc. 1.

1 not on the actual strength of the rails themselves against the posts.”<sup>5</sup> DuBois also  
2 alleges that the railing’s metal fasteners were “rusted to the point of failure.”<sup>6</sup>

### 3 **III. STANDARD OF REVIEW**

4 Rule 56(a) authorizes motions for partial summary judgment upon any part of a  
5 claim or defense. Summary judgment is appropriate where “there is no genuine dispute  
6 as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>7</sup> The  
7 materiality requirement ensures that “only disputes over facts that might affect the  
8 outcome of the suit under the governing law will properly preclude the entry of summary  
9 judgment.”<sup>8</sup> Ultimately, “summary judgment will not lie if the . . . evidence is such that a  
10 reasonable jury could return a verdict for the nonmoving party.”<sup>9</sup> However, summary  
11 judgment is appropriate “against a party who fails to make a showing sufficient to  
12 establish the existence of an element essential to that party’s case, and on which that  
13 party will bear the burden of proof at trial.”<sup>10</sup>

14 The moving party has the burden of showing that there is no genuine dispute as  
15 to any material fact.<sup>11</sup> Where the nonmoving party will bear the burden of proof at trial  
16 on a dispositive issue, the moving party need not present evidence to show that  
17 summary judgment is warranted; it need only point out the lack of any genuine dispute  
18 as to material fact.<sup>12</sup> Once the moving party has met this burden, the nonmoving party  
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20 <sup>5</sup>Doc. 1-1 at 2 ¶ 8.

21 <sup>6</sup>*Id.*

22 <sup>7</sup>Fed. R. Civ. P. 56(a).

23 <sup>8</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

24 <sup>9</sup>*Id.*

25 <sup>10</sup>*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

26 <sup>11</sup>*Id.* at 323.

27 <sup>12</sup>*Id.* at 323-25.

1 must set forth evidence of specific facts showing the existence of a genuine issue for  
2 trial.<sup>13</sup> All evidence presented by the non-movant must be believed for purposes of  
3 summary judgment, and all justifiable inferences must be drawn in favor of the  
4 non-movant.<sup>14</sup> However, the non-moving party may not rest upon mere allegations or  
5 denials, but must show that there is sufficient evidence supporting the claimed factual  
6 dispute to require a fact-finder to resolve the parties' differing versions of the truth at  
7 trial.<sup>15</sup>

#### 8 **IV. DISCUSSION**

##### 9 **A. Comparative Fault is a Fact Question**

10 Alaska's comparative fault statute provides in pertinent part that

11 [i]n all actions involving fault of more than one person . . . the court . . .  
12 shall instruct the jury to answer special interrogatories or, if there is no  
13 jury, shall make findings, indicating (1) the amount of damages each  
14 claimant would be entitled to recover if contributory fault is disregarded;  
and (2) the percentage of the total fault that is allocated to each . . .  
person responsible for the damages.<sup>16</sup>

15 The statute makes clear that comparative fault determinations are the province of the  
16 fact finder: here, the jury.<sup>17</sup> Although Coeur recognizes that it would be inappropriate for  
17 the court to usurp the jury's task of apportioning fault,<sup>18</sup> its motion nevertheless seeks  
18 judgment as a matter of law that DuBois' actions amount to contributory negligence. In

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20 <sup>13</sup>*Anderson*, 477 U.S. at 248-49.

21 <sup>14</sup>*Id.* at 255.

22 <sup>15</sup>*Id.* at 248-49.

23 <sup>16</sup>AS 09.17.080(a).

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25 <sup>17</sup>DuBois filed a jury demand in state court. Doc. 1-1 at 5. *See also S. Alaska*  
26 *Carpenters Health & Sec. Trust Fund v. Jones*, 177 P.3d 844, 858 (Alaska 2008) (noting that  
27 apportionment of fault under AS 09.17.080 is question of fact); *State v. Kaatz*, 572 P.2d 775,  
781 (Alaska 1977) ("[I]t is clear [that] the apportionment of percentages is a question of fact, not  
of law.").

28 <sup>18</sup>Doc. 33 at 6 n.38.

1 other words, Coeur is asking the court to apportion fault to DuBois at a percentage  
2 greater than zero. This, the court cannot do.

3 Coeur cites a case from the Eastern District of California, *United States v. Sierra*  
4 *Pacific Industries*,<sup>19</sup> in support of its argument that the court should determine DuBois'  
5 contributory negligence as a matter of law. The *Sierra Pacific* court ruled as a matter of  
6 law that the plaintiff could not be at fault for certain conduct because it owed no duty to  
7 act under the circumstances.<sup>20</sup> This holding is inapplicable here because it pertains to  
8 whether a party owed a duty of care. It is appropriate for a court to resolve this question  
9 because "[t]he existence and extent of a duty of care are questions of law for the court  
10 to determine."<sup>21</sup> The questions presented here are of a different variety: Coeur states  
11 that the two questions presented are "whether DuBois breached his duty as a mine  
12 inspector to competently [] inspect the handrail" and whether he should therefore "be  
13 allocated comparative fault."<sup>22</sup> Because breach and causation present questions of  
14 fact,<sup>23</sup> Coeur's motion will be denied.

#### 15 **B. Severe Permanent Physical Impairment**

16 Alaska Statute 09.17.010 generally caps noneconomic damages arising out of a  
17 single injury or death at "\$400,000 or the injured person's life expectancy in years  
18 multiplied by \$8,000, whichever is greater."<sup>24</sup> This cap is raised to "\$1,000,000 or the  
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20 <sup>19</sup>879 F. Supp. 2d 1128, 1134 (E.D. Cal. 2012).

21 <sup>20</sup>*Id.* at 1134. The court also held that whether the plaintiff's conduct otherwise  
22 comported with the requisite standard of care presented a triable question of fact. *Id.* at 1135.

23 <sup>21</sup>*Beck v. State, Dep't of Transp. & Pub. Facilities*, 837 P.2d 105, 109 (Alaska 1992).

24 <sup>22</sup>Doc. 55 at 1.

25 <sup>23</sup>*Bolieu v. Sisters of Providence in Washington*, 953 P.2d 1233, 1235 (Alaska 1998).  
26 See also *Kelley v. Hyundai Motor Co.*, No. 4:09CV000894 JMM, 2011 WL 1533456, at \*3 (E.D.  
27 Ark. Apr. 21, 2011) ("Because disputed issues of fact exist on the issue of proximate cause, the  
Court finds that summary judgment is not proper.").

28 <sup>24</sup>AS 09.17.010(b).

1 person's life expectancy in years multiplied by \$25,000, whichever is greater" if "the  
2 damages are awarded for severe permanent physical impairment or severe  
3 disfigurement." <sup>25</sup> Coeur seeks a ruling that the lower cap applies here because DuBois  
4 cannot show he has suffered a severe permanent physical impairment.

5 Prior to its amendment in 1997, <sup>26</sup> AS 09.17.010 provided that there was no cap  
6 on noneconomic damages for "severe physical impairment."<sup>27</sup> The Alaska Supreme  
7 Court interpreted this phrase in *State v. Johnson*,<sup>28</sup> by reference to the definition of  
8 "physical impairment" found in Title 45, Part 84, of the Code of Federal Regulations.<sup>29</sup>  
9 That regulation defines "physical impairment" as "any physiological disorder or  
10 condition, cosmetic disfigurement, or anatomical loss affecting one or more of the  
11 following body systems: neurological; musculoskeletal; special sense organs;  
12 respiratory, including speech organs; cardiovascular; reproductive, digestive,  
13 genito-urinary; hemic and lymphatic; skin; and endocrine."<sup>30</sup> Although *Johnson* did not  
14 define the precise contours of which impairments qualify as "serious," it held that the  
15 impairment before the court so qualified because it caused the loss of "the normal use  
16 of a body system necessary for day-to-day life."<sup>31</sup> This language appears to track the  
17 definition of "handicapped person" from 45 C.F.R. § 84.3(j) as meaning someone whose  
18 physical impairment "substantially limits one or more major life activities,"<sup>32</sup> including

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20 <sup>25</sup>AS 09.17.010(c).

21 <sup>26</sup>1997 ALASKA SESS. LAWS, ch. 26 § 9.

22 <sup>27</sup>AS 09.17.010(c) (1996). See also *State, Dep't of Corr. v. Johnson*, 2 P.3d 56, 64  
23 (Alaska 2000).

24 <sup>28</sup>*Johnson*, 2 P.3d at 65.

25 <sup>29</sup>*Id.* at 65 n.42.

26 <sup>30</sup>45 C.F.R. § 84.3(j)(2)(i).

27 <sup>31</sup>*Johnson*, 2 P.3d at 65.

28 <sup>32</sup>45 C.F.R. § 84.3(j)(1).

1 “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking,  
2 breathing, learning, and working.”<sup>33</sup>

3 The word “permanent” was added to AS 09.17.010(c) in 1997. The Alaska  
4 Supreme Court has described “severe permanent physical impairments” as those that  
5 “are so significant that they will permanently and seriously alter the course of the injured  
6 person’s life.”<sup>34</sup> The question whether a person has suffered a severe permanent  
7 physical impairment is ordinarily a question of fact for the jury, but it can be answered  
8 as a matter of law where reasonable persons cannot differ as to the facts.<sup>35</sup> The trial  
9 court must make a threshold determination that a juror could reasonably find that the  
10 plaintiff suffered from such an impairment before submitting that question to the jury.<sup>36</sup>

11 Coeur does not dispute that DuBois’ injury, which it describes as “a compression  
12 fracture of his T-11 vertebra,” qualifies as a “physical impairment.”<sup>37</sup> Instead, it argues  
13 that his subsequent “medical consultations, steroidal injections, and physical therapy”  
14 led to improvements and, as of January 2013, his physical impairment was no longer  
15 severe or permanent.<sup>38</sup> It relies on two pieces of evidence. First, Coeur cites a  
16 January 29, 2013 functional capacity evaluation (“FCE”) performed by physical therapist  
17 Shasta K. Hood.<sup>39</sup> Ms. Hood’s FCE concludes that DuBois “demonstrated the ability to  
18 meet the physical demand requirements of a Supervisory Mine Inspector.”<sup>40</sup> The FCE  
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20 <sup>33</sup>*Id.* § 84.3(j)(2)(ii).

21 <sup>34</sup>*L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1136 (Alaska 2009).

22 <sup>35</sup>*Johnson*, 2 P.3d at 65.

23 <sup>36</sup>*Cf. City of Bethel v. Peters*, 97 P.3d 822, 828 (Alaska 2004).

24 <sup>37</sup>Doc. 35 at 12.

25 <sup>38</sup>*Id.* at 12-14.

26 <sup>39</sup>Doc. 34-8 at 1-9; Doc. 34-9 at 1-4; Doc. 34-10 at 1.

27 <sup>40</sup>Doc. 43-8 at 1.

1 also concludes, however, that “[d]eficits identified during testing include significant  
2 deficits in cervical, thoracic, and lumbar spine ROM, Strength deficits noted in L UE and  
3 LE. Moderate symptom increase with push/pull activities.”<sup>41</sup> Next, Coeur cites the  
4 report of Dennis Chong, MD, a physiatrist that it retained to review DuBois’ medical  
5 records. Dr. Chong’s report states that he reviewed DuBois’ medical history and  
6 deposition testimony. He states that he specifically reviewed the FCE, and he  
7 concludes without explanation that it is “valid and reliable.”<sup>42</sup>

8 DuBois contends that his back injury is severe and permanent. Among other  
9 things, he cites:

- 10 • A February 21, 2013 report of Larry A. Levine, M.D. that apparently  
11 concludes that it would not be safe for DuBois to work as a full time  
12 Supervisory Mine Inspector;<sup>43</sup>
- 13 • A July 18, 2013 report of Occupational Medicine Consultant Neal L.  
14 Presant, M.D., M.P.H. that concludes that DuBois’ back condition is likely  
15 permanent, “[h]e is limited in his ability to perform any heavy labor,”  
16 “[h]eavy lifting, squatting, climbing ladders, and walking on uneven ground  
17 could be hazardous for him,”<sup>44</sup> “he would have permanent limitations from  
18 his back that would prevent him from doing any work that required more  
19 than light physical labor,”<sup>45</sup> and his medical condition limits his following  
20 major life activities: ambulation, lifting, and general mobility.<sup>46</sup>

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22 <sup>41</sup>*Id.*

23 <sup>42</sup>Doc. 34-7 at 14.

24 <sup>43</sup>Doc. 34-4 at 11.

25 <sup>44</sup>Doc. 51-6 at 1.

26 <sup>45</sup>*Id.* at 2.

27 <sup>46</sup>*Id.*



- An August 14, 2015 affidavit of his treating physician, Susan Klimow, M.D., who states that (at least as of November 2014, when she stopped treating him) DuBois was unable to do his job as a mine inspector based on the symptoms of his lower back pain that radiated to his leg.<sup>47</sup>
- DuBois' own deposition testimony where he states that as a result of his injury he is no longer able to perform activities such as cooking, grocery shopping, household repairs, yard work, sex, fishing or hunting.<sup>48</sup>

Coeur has not met its burden of showing that there is no genuine dispute as to the severity or permanency of DuBois' physical impairment. Its evidence tends to show that DuBois is capable of performing the job requirements of a mine inspector, but this is not the same thing as establishing that DuBois' impairment is neither severe nor permanent. Further, DuBois' evidence affirmatively demonstrates a genuine dispute as to these issues. Because a jury could reasonably find that DuBois' fall caused him to suffer a severe permanent physical impairment, Coeur's motion will be denied.

#### **IV. CONCLUSION**

Based on the preceding discussion, Coeur's motions for partial summary judgment at docket 33 and 34 are **DENIED**.

DATED this 19th day of November 2015.

/s/ JOHN W. SEDWICK  
SENIOR UNITED STATES DISTRICT JUDGE

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<sup>47</sup>Doc. 51-1 at 1-2.

<sup>48</sup>Doc. 46 at 8-10.